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In The
Supreme Court of the United States

MICHAEL A. WATSON,

PETITIONER,

v.

UNITED STATES,

RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Gun Owners Foundation ("GOF") and Conservative Legal Defense and Education Fund ("CLDEF") were established as nonprofit corporations in the Commonwealth of Virginia in 1983 and in the District of Columbia in 1982, respectively. Both *amici* are nonprofit educational organizations, exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code and dedicated, *inter alia*, to the correct construction, interpretation and application of the law.[1]

GOF primarily engages in nonpartisan research and public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the right to own and use firearms, and related issues. CLDEF engages in nonpartisan research and education and public interest litigation, particularly that related to the correct construction of the Constitution and federal and state statutes. In the past, each of the *amici* has filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2] Both *amici* are interested in the preservation of the separation of powers and principles of federalism advanced by the strict construction of federal criminal laws.

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

SUMMARY OF ARGUMENT

At issue in this case is whether the prohibition against a person who, "during and in relation to ... a drug trafficking crime uses ... a firearm," as provided for in 18 U.S.C. Section 924(c)(1)(A), applies to a defendant who received a firearm in exchange for illegal drugs.

In the recent past, this Court has construed this prohibition, guided only by the general rule of construction that the language be understood according to its ordinary or natural meaning, subject only to a narrower construction of any residual ambiguity under the rule of lenity. *See, e.g.*, Smith v. United States, 508 U.S. 223 (1993). The reach of a federal criminal statute should, however, be governed at the outset by a rule of strict construction, confining the Court to the words of the statute, all reasonable doubts concerning the meaning of those words resolved in favor of the defendant. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) and Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850).

This rule of strict construction is not like the rule of lenity, in two respects. First, unlike the rule of lenity, the rule of strict construction is designed to operate in the first instance to preclude a broad reading of the language of a criminal statute. Second, unlike the rule of lenity, the rule of strict construction is designed to limit prosecutorial discretion and to advance individual liberty, not be employed to show leniency to a defendant as a matter of judicial equity.

The rule of strict construction of criminal statutes is deeply rooted in the common law, so well-established that it was affirmed without citation of authority by this Court as late as 1955. In contrast, the rule of lenity is of recent origin, emerging as a rule in the 1960's and 1970's, yet it has

swallowed up the rule of strict construction.

The conflict and confusion over the meaning of "uses ... a firearm" in this case reflects the shortcomings of the rule of lenity and the adverse consequences of misusing the rule of lenity as a device to avoid the rule of strict construction, especially in firearms cases. More specifically, in the construction of the penal provisions of 18 U.S.C. Section 924(c)(1)(A), this Court has failed to recognize that the meaning of use is "inordinately sensitive to context," having wandered away from the words of the criminal prohibition, consulting indiscriminately dictionary definitions and the civil forfeiture provisions of the Gun Control Act of 1968 ("Gun Control Act"), 82 Stat. 1213. By extracting the word "use" from its criminal context, the Court has rejected a narrower reading of the term under the rule of lenity, having promoted a kind of loose-leaf analysis of the meaning of use, embedded in extra textual considerations of Congressional concerns about the "dangerous combination" of "drugs and guns."

According to the rule of strict construction, it is not enough that a firearm was "actively employed" or an "operative factor" in the drugs for gun transaction, as some lower courts have concluded. Rather, it must be proved that the **defendant used** the firearm provided to him in a drug deal and that the **defendant's use** of that firearm occurred "**during and in relation to**" that drug deal. After all, the *actus reus* element of any crime must be committed by the defendant, and not by someone else.

In ordinary parlance, the defendant's relationship to the firearm in this case would not be described by the word "use," but by the word "receive." Significantly, the Gun Control Act contains a number of offenses, the *actus reus* element of which is "receive." Yet, not one of these offenses criminalizes a

person who **contemporaneously** receives a firearm in exchange for illegal drugs. Instead, 18 U.S.C. Section 922(g) prohibits the receipt of a gun by a person who may have been convicted of a illegal drug deal in the **past.** And Section 924(b) prohibits the receipt of a firearm intended or reasonably expected to be used to commit an illegal drug deal in the **future.** The rule of strict construction, however, precludes a court from filling in this gap by imputing an unnatural meaning to the word "use" to cover the receipt of a firearm for illegal drugs in the **present**, and for good reason.

The rule of strict construction was crafted to preclude the very kind of police and prosecutorial discretion exercised in this case, transforming a single transaction into three felonies without the necessary justification of a clearly applicable criminal prohibition.

Further, the rule of strict construction would serve the constitutional principle of federalism, providing real limits to the reach of federal law, and requiring Congress to speak with increasing clarity in the area of law that is arguably outside its enumerated powers, having been reserved by the Tenth Amendment to the States.

ARGUMENT

In the recent past, this Court has grappled with the meaning of the two phrases — "uses or carries a firearm" and "during and in relation to" — that appear in 18 U.S.C. Section 924(c)(1)(A). *See* Smith v. United States, 508 U.S. 223 (1993); Bailey v. United States, 516 U.S. 137 (1995); and Muscarello v. United States, 524 U.S. 125 (1998). In two of these cases, the Court has wrestled with the meaning of "uses ... a firearm." *See* Smith, 508 U.S. at 228-37; Bailey, 516 U.S. at 138, 142-50. Yet its meaning remains unclear and, once again, is before the

Court. This time, the question is whether a person who receives an unloaded firearm from a person in exchange for illegal drugs has "use[d]" that firearm "during and in relation to" the sale of those illegal drugs, within the meaning of 18 U.S.C. Section 924(c)(1)(A).

I. THE RULE OF STRICT CONSTRUCTION OF CRIMINAL STATUTES APPLIES IN THIS CASE.

A. Recently, this Court Has Applied General Rules of Statutory Construction to 18 U.S.C. Section 924(c)(1)(A).

In both Smith and Bailey, this Court sought to ascertain the meaning of "uses ... a firearm" and "during and in relation to" without guidance of any rule specifically designed to govern the construction of a criminal statute. *See* Smith, 508 U.S. at 228; Bailey, 516 U.S. at 142-43. Rather, as the Smith Court indicated, it would be guided by a general rule of construction that "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning," in light of the entire "statutory scheme," just as it would do in the construction of a civil statute. *See* Smith, 508 U.S. at 228 and 233 (citing United Savings Assn. of Texas v. Timbers of Inwood, 484 U.S. 365, 371 (1988)).

Only after employing this general rule of construction did the Smith Court acknowledge the possibility that a "narrower construction" might be appropriate because the statute at issue was a criminal one. Smith, 508 U.S. at 239. According to Smith, however, a narrower construction would be warranted only under "the rule of lenity," a rule that applies only where, "'**after seiz[ing] everything from which aid can be derived**' the Court is '**left** with an ambiguous statute.'" *Id.* (emphasis added). After combing not only the language of Section 924(c)

defining a **criminal** offense, but also the language of Section 924(d) providing for **civil** forfeiture,[3] the Smith Court found no ambiguity. Thus, it rejected a narrower construction — more lenient to defendants — imputing to Congress the policy view derived from its observation that "[w]hen Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination":

> We therefore see no reason why Congress would have intended courts and juries ... to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity. [Smith, 308 U.S. at 240.]

Such an approach to statutory construction has no place in analyzing the elements of a criminal statute, especially one which carries a minimum prison term, with no specified maximum, to be consecutively served after the sentence imposed for the predicate crime, as provided for in 18 U.S.C. Section 924(c)(1)(A).

B. The Reach of Federal Criminal Statutes Should Be Governed by a Rule of Strict Construction.

For over 135 years, a rule of strict construction fixed the parameters of construction of a federal criminal statute to "the letter of the statute,"[4] "all reasonable doubts concerning its meaning ... operat[ing] in favor of the [defendant]." Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850). Grounded in the separation of powers principle that "[i]t is the legislature, **not**

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[3] *See* Smith, 508 U.S. at 233-36.

[4] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

the Court, which is to define a crime, and ordain its punishment," Chief Justice John Marshall insisted that the rule of strict construction required that "the intention of the legislature is to be collected from the **words** they employ." United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820) (emphasis added). Furthermore, designed to protect "the **rights** of individuals,"[5] the doctrine of strict construction guarded against an overreaching executive department that would insist on reading a statute "in a broad sense" to reach conduct not specifically described in the statute. *See* Fasulo v. United States, 272 U.S. 620, 625-26 (1926). Indeed, Justice Holmes — applying the rule of strict construction — found that "motor vehicle," appearing in a statute prohibiting the transportation thereof in interstate or foreign commerce, knowing it to be stolen, did not include a stolen airplane:

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies.... [McBoyle v. United States, 283 U.S. 25, 27 (1931).]

Over the next 24 years, the Court had several occasions to apply the rule, doing so without hesitation,[6] culminating in 1955 with the statement "[t]hat criminal statutes are to be construed strictly[,] a proposition which calls for the citation of no authority." United States v. Bramblett, 348 U.S. 503, 509 (1955).

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[5] *Id.* (emphasis added).

[6] *See, e.g.*, United States v. Resnick, 299 U.S. 207, 209-10 (1936); Pierce v. United States, 314 U.S. 306 (1941); United States v. Halseth, 342 U.S. 277, 280-81 (1952).

In the same year, however, without any mention of the rule of strict construction, this Court applied a new limiting doctrine, invoking "lenity" on behalf of a person who had been charged with two counts of violation of the Mann Act arising from a single act of interstate transportation of two women for immoral purposes, refusing to attribute to Congress "an undeclared will" to "turn[] a single transaction into multiple offenses." Bell v. United States, 349 U.S. 81, 83-84 (1955). Initially, the Court applied the rule of lenity without reference to the rule of strict construction, as it had in Bell, to ameliorate the reach of a criminal prohibition. *See* Rewis v. United States, 401 U.S. 808, 812 (1971). Soon thereafter, however, the Court substituted the "rule of lenity" for the rule of strict construction, invoking it only **after** the application of a general rule of statutory construction, and only if that general rule left the Court with a residual ambiguity. *See* United States v. Bass, 404 U.S. 336, 347 (1971), as cited in Smith, 508 U.S. at 239.

Thus, in Huddleston v. United States, 415 U.S. 814 (1974) — a case involving the construction of the 18 U.S.C. Section 922(a)(6) prohibition against knowingly making a false statement "in connection with the acquisition" of a firearm from a federally-licensed dealer — the Court did not invoke the rule of strict construction in its analysis of whether the statute covered "redemption of a firearm from a pawnshop." Rather, it engaged in a wide-ranging search for the intent of Congress, beyond the language of the statute, tacking on at the end of its analysis, a short paragraph treating the Bramblett rule of strict construction as a secondary tool to be employed only if there were a residual "ambiguity" in the meaning of the word that it had already dissected and clarified. Huddleston, 415 U.S. at 819-31.

Remarkably, the Huddleston Court purported to find its "rule of lenity" approach not only in Bramblett, but in Chief

Justice Marshall's opinion in Wiltberger. *See* Huddleston, 415 U.S. at 830-32. But the venerable chief justice's opinion invoked the rule of strict construction at the front end of his analysis of the meaning of the words at issue in the case, and, consequently, his search for "legislative intent" was circumscribed by the statutory language:

> The intention of the legislature is to be collected **from the words they employ**.... The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. [Wiltberger, 18 U.S. at 95-96 (emphasis added).]

Not only did the Huddleston Court disregard this salutary rule of construction, but it coupled its citation of Wiltberger with "lenity,"[7] a concept that was linked in Marshall's day to the executive "pardon" power,[8] not to a rule of law to be applied by the courts. Indeed, during the period from the early 19th century through the first third of the 20th century, this Court associated "lenity" to acts of mercy, not to a rule of statutory interpretation. *See, e.g.*, Sprigg v. Bank of Mt. Pleasant, 39 U.S. (14 Pet.) 201, 206 (1840); United States v. Ford, 99 U.S. 594, 600 (1879); Dunn v. United States, 284 U.S. 390, 393 (1932). Even as late as 1961, this Court recognized that the rule of lenity, as rule of statutory construction, was ill-suited to the "function of the judiciary" in that its "overriding consideration [was] being lenient to wrongdoers.". *See* Callanan v. United States, 364 U.S. 587, 596 (1961).

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[7] *See* Huddleston, 415 U.S. at 830-31.

[8] *See* The Anna Maria, 15 U.S. (2 Wheat.) 327, 333 (1817).

Despite this observation, the rule of lenity has persisted as a substitute for the rule of strict construction of a criminal statute, invoked only in the rare case where the Court finds a "statutory ambiguity" after it has freely combed through "dictionaries, surveys of press reports, [and] the Bible [to] tell us, dispositively, what [a word] means embedded in [18 U.S.C.] § 924(c)(1)." *See* Muscarello v. United States, 524 U.S. at 142-43 (Ginsburg, J., dissenting).

A survey of the application of the rule of lenity as a rule of statutory construction has concluded that the rule, and its concomitant admonition "in favor of [a] narrow reading" of a criminal statute, has been applied only once to a federal gun control statute. *See* D. Per-Lee, "Supreme Court's Views as to the 'Rule of Lenity' in the Construction of Criminal Statutes" ("Lenity as a Rule of Construction"), 62 L.Ed.2d 827, 831 (1981), citing United States v. Bass, 404 U.S. 336 (1971). In all of the other gun cases surveyed, the Court, after finding no "ambiguous" statutory residue, found no occasion to resort to the narrowing rule of lenity. D. Per-Lee, "Lenity as a Rule of Construction," at 831.

The difference between strict construction of a federal criminal statute and the application of the rule of lenity is profound. The premise of strict construction is that, even though words may be polymorphic, each usage of a word in context has only one meaning. Strict construction is based on principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited; and to insure that a legislature speaks with special clarity when marking the bounds of criminal conduct. Moreover, strict construction is applied at the outset of the analysis, the inquiry seeking the precise meaning of the particular Congressional usage of words, using traditional contextual and other clues. Strict construction requires that

courts decline to impose punishment for actions that are not plainly and unmistakably proscribed.

The rule of lenity is applied at the end of the inquiry, and only if an ambiguity exits after "seiz[ing] everything from which aid can be derived." Smith, 508 U.S. at 239. Although the rule of lenity gives the appearance of construing a criminal statute in favor of lenity toward an accused, it gives judges license to look beyond the meaning of the particular usage in the text to matters not apparent from the words of the proscribed conduct, such as perceived underlying Congressional policy. As a result, few ambiguities are ever found, and the rule is applied only in a rare case.

C. The Conflict and Confusion over the Meaning of "Uses ... a Firearm" Is Best Resolved by a Return to the Rule of Strict Construction.

While four courts of appeals have approached the question by a careful examination of the statutory language to ascertain whether the ordinary meaning of the word "use" made sense when applied to the receipt of a firearm in exchange for drugs,[9] they are in the minority. Six courts of appeals have failed to conduct such an examination.[10] For example, despite its

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[9] *See* United States v. Stewart, 246 F.3d 728, 729-33 (D.C. Cir. 2001); United States v. Warwick, 167 F.3d 965, 975-76 (6th Cir. 1999); United States v. Westmoreland, 122 F.3d 431, 434-36 (7th Cir. 1997); and United States v. Montano, 398 F.3d 1276, 1281-84 (11th Cir. 2005).

[10] *See* United States v. Cotto, 456 F.3d 25, 27-30 (1st Cir. 2006); United States v. Sumler, 294 F.3d 579, 581-83 (3d Cir. 2002); United States v. Harris, 39 F.3d 1262, 1269 (4th Cir. 1994); United States v. Ulloa, 94 F.3d 949, 955-56 (5th Cir. 1996); United States v. Cannon, 88 F.3d 1495, 1509 (8th Cir. 1996); and United States v. Ramirez-Rangel, 103 F.3d 1501, 1506 (9th Cir. 1996).

recognition that according to the "the most natural reading of the statute, [the defendant] did not 'use' the guns by bartering for them," the First Circuit chose to disregard the "common understanding of [use]." Cotto, 456 F.3d at 28. Additionally, after acknowledging that "'there is no grammatically correct way to express that a person receiving payment is thereby "using" the payment,'" the Third Circuit nevertheless concluded that this Court had established in Smith and Bailey that "'use' means 'barter,'" and, as "Humpty Dumpty ... said, 'When I use a word ... it means just what I choose it to mean neither more nor less.'" Sumler, 294 F.3d at 583. Thus, the Third Circuit explained, it was "not free to ignore a dictated definition" of this Court, no matter how "grammatically [in]correct." *Id.*

The Fourth and Eighth Circuits, also citing Smith, concluded that receiving a gun in exchange for drugs and receiving drugs in exchange for a gun, was, as the Eighth Circuit put it, "a distinction without a difference." *See* Cannon, 88 F.3d at 1509. *See also* Harris, 39 F.3d at 1269.[11] Yet, just a year after the Eighth Circuit's opinion in Cannon, the U.S. Court of Appeals for the Ninth Circuit handed down an opinion that demonstrates dramatically that it does make a difference whether a person trades a firearm for drugs, or receives a firearm for drugs. In Ramirez-Rangel, two defendants received Section 924(c)(1)(B)(ii)'s mandatory 30-year sentences, even though there was no evidence that they knew that a government undercover agent had placed "two AK-47 machine guns" in a

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[11] Although the Fifth Circuit engaged in a more extensive discussion as to whether Smith had been overruled by Bailey, it had already concluded that "no more need be said" than that "*Smith* was not 'distinguishable on the basis that here the defendant owned the drugs and was bartering them for the firearms, while in *Smith* the defendant owned the firearm and was bartering for drugs.'" Ulloa, 94 F.3d at 955.

"seabag," in exchange for drugs provided by the defendants:

> [I]n the circumstances of this case ... the government supplied the weapons and delivered them in a covered bag. If knowledge or intent of the defendants is utterly immaterial, then the government is free to put machine guns in the bag **even if they were not bargained for, and thereby add 25 more years to the penalty imposed on defendants with no additional culpability** on their part. [103 F.3d 1501, at 1506 (emphasis added).]

If the circumstances were reversed — delivery by the two defendants of two machine guns in a seabag to an undercover government agent for drugs — there would be **no** question of defendants' knowledge, and the government agent would have had no opportunity to up the ante as he did when he was furnishing the weapons — significant differences indeed!

Had the Ninth Circuit applied the rule of strict construction to the meaning of "use," it would have avoided the "draconian" penal result, as well as eliminated the real risk of government manipulation and entrapment. Indeed, as this Court stated in Harrison v. Vose, resolving "all reasonable doubts concerning [a penal statute's] meaning" in defendant's favor would guard against the injustice of "'mak[ing] every doubtful phrase a drag-net for penalties." *Id.*, 50 U.S. (9 How.) at 378. Or, as Herbert L. Packer has put it, the rule of strict construction of criminal statutes "is necessary in order to secure evenhandedness in the administration of justice and to eliminate oppressive and arbitrary exercise of official discretion." H. Packer, The Limits of the Criminal Sanction (hereinafter "Limits") 80 (Stanford Univ. Press: 1968).

II. STRICTLY CONSTRUED, THE PHRASE "ANY PERSON WHO, DURING AND IN RELATION TO ANY ... DRUG TRAFFICKING CRIME ... USES ... A FIREARM" COULD NOT APPLY TO A PERSON WHO RECEIVES A FIREARM IN EXCHANGE FOR ILLEGAL DRUGS.

In laying down the maxim that "penal laws are to be construed strictly," Chief Justice Marshall explained that "[i]t is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Wiltberger, 18 U.S. at 95. In applying this rule of construction, the chief justice emphasized that "the **words** of the statute" are to be examined, so that "[t]he intention of the legislature [would be] collected from the **words** they employ." *Id.* at 96 (emphasis added).

In its initial effort to ascertain the reach of Section 924(c)(1)(A)'s proscription against "any defendant who 'during and in relation to [a] crime of drug trafficking uses ... a firearm,'" this Court did not apply this principle. Instead of analyzing the several words contained in the prohibition, it focused on the possible meaning of only **one word** — "use." Smith, 508 U.S. at 228-29. Indeed, as the dissenting opinion pointed out, "[t]he Court beg[an] its analysis by focusing on the word 'use' ..., and explaining that the dictionary definitions of that word are very broad." *Id.*, 508 U.S. at 241 (Scalia, J., dissenting).

Beginning, then, with the broad meaning attributed to the word "use" in a variety of contexts, the Smith Court quickly concluded that, by exchanging his firearm for drugs, the defendant had "used" it. *Id.*, 508 U.S. at 229. Having begun with the proposition that "the dictionary definitions and

experience [made] clear [that] one can use a firearm in a number of ways," the Court, in effect, shifted the burden to the defendant to show that Congress intended "use" to be construed in a more limited way. *See* Smith, 508 U.S. at 229-30. And, as the dissenting opinion contended, by isolating the word "use" at the outset from the rest of the words in the crime defined by Section 924(c)(1)(A), the Court failed to recognize that the meaning of the word "use" is "inordinately sensitive to context," with certain contexts, like Section 924(c)(1)(A), narrowing the meaning and others, like Section 924(d) — the civil forfeiture statute — broadening it. *See* Smith, 508 U.S. at 245 (Scalia, J., dissenting).

Two years later, this Court purported to change its analytic approach to the construction of Section 924(a)(1)(A), stating that "'[u]se' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the sentencing scheme, to determine the meaning Congress intended." Bailey, 516 U.S. at 143. Yet, even before the Court engaged in its analysis of the statute as a whole, it had already stated its holding "that § 924(c)(1) requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.*, 516 U.S. at 143 (italics original). Thus, despite its statement to the contrary, the Court still focused on the meaning of the single word "use," not all of the "language of the statute." *See id.*, 516 U.S. at 144-45.

By extracting its specific holding of the meaning of "use" from the statutory text and, in the next paragraph, reaffirming the Smith rule that the barter of a gun for drugs was a "use,"[12] lower courts have seized on the phrases, "active employment"

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[12] *See* Bailey, 516 U.S. at 143.

and "operative factor," to support the conclusion that it makes no difference whether the defendant bargained drugs for a firearm or traded firearms for drugs. Either way, the firearm was either "actively employed" or an "operative factor" in relation to the drug trafficking offense. *See, e.g.*, Cotto, 456 F.3d at 28-29. *See also* Sumler, 294 F.3d at 582; Cannon, 88 F.3d at 1509; Ramirez-Rangel, 103 F.3d at 1506; Ulloa, 94 F.3d at 955.

But the statute does not criminalize the use of a firearm in the abstract. Rather, it identifies the offender as "any **person** who, **during** and in relation to any ... drug trafficking crime ... **uses** ... a firearm." 18 U.S.C. § 924(c)(1)(A) (emphasis added). The question then is not whether a firearm has been actively employed, or served as an operative factor, in effectuating a drug trafficking crime, but whether the **defendant during and in relation to** that crime actively employed (*i.e.*, used) a firearm. *Compare, e.g.*, Stewart, 246 F.3d at 731, *with* Ulloa, 94 F.3d at 955.

By dispensing with the rule of strict construction which requires that an offense be clearly "enumerated" in the text, the Bailey holding and reaffirmation of Smith have spawned extra-textual justifications for extending Section 924(c)(1)(A)'s reach to a seller who received a firearm from a buyer at the conclusion of a drug deal. For example, the Third Circuit justified its ruling that it made no difference whether the defendant had bartered drugs for a firearm or vice-versa because, in that case:

> [T]he transaction was between two private individuals and, therefore, the spectre of sentence entrapment does not lurk in the shadows. In addition, it was the defendant in this case who actively solicited the barter of drugs for guns. [Sumler, 294 F.3d at 583.]

See also Cannon, 88 F.3d at 1509.

Additionally, and even more significantly, the First Circuit explained that "the **rationale** of § 924(c) supports our interpretation" that it makes no difference whether the defendant exchanged guns for drugs or drugs for guns[13]:

> As the Court observed in Smith, "[w]hen Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination...." That is so whether the defendant transfers or receives the gun. Just as the Supreme Court did not think Congress "intended courts and juries applying § 924(c)(1) to draw a fine **metaphysical** distinction between a gun's role in a drug offense as a weapon and its role as an item of barter," we do not think it intended to draw a distinction between bartering with a firearm and bartering for a firearm. [Cotto, 456 F.3d at 29-30 (emphasis added).]

Had the First Circuit honored the rule of strict construction, it could not have dismissed the lines drawn by the words employed by Congress as "metaphysical," nor divined Congress's "rationale" for the Section 924(c)(1)(A) prohibition and penalty by reference to the Smith case. After all, the Smith Court, itself, had departed from the rule of strict construction, having justified its interpretation of the meaning of "use" by reference to a 1989 report that "56 percent of all murders in New York City were drug related [and] the figure for the Nation's Capital was as high as 80 percent" to reinforce its decision that a firearm for drug transaction was proscribed by Section 924(c)(1)(A). *See* Smith, 508 U.S. at 240. By

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[13] Cotto, 456 F.3d at 29.

dispensing with the rule of strict construction, both courts ignored Chief Justice Marshall's admonition that:

> It would be dangerous, indeed, to carry the principle, that a case which is within the **reason or mischief** of a statute, is within its provisions, so far to **punish** a crime **not enumerated** in the statute, because it is of equal atrocity, or of kindred character. [Wiltberger, 18 U.S. (5 Wheat.) at 96 (emphasis added).]

Applying the rule of strict construction to Section 924(c)(1)(A) reveals that it is not enough that a firearm be found to be "actively employed" or an "operative factor" in relation to a drug trafficking offense. Rather, as the language of the section clearly states, the **"person"** who stands accused of violating Section 924(c)(1)(A) must "**during** and in relation to" the drug trafficking offense "**use** [the] firearm." In other words, it is not enough that a firearm was **"employed"** in **"relation"** to the predicate offense, but whether the **defendant used** a firearm "during and in relation to" the predicate offense. It is **defendant's action** that is denominated the crime, **not** the presence of a firearm. After all, the action brought against a person for violation of Section 924(c)(1)(A) is *in personam*, not *in rem*. It is the defendant whose liberty is at stake, not the property ownership of the firearm. Thus, contrary to Smith, the meaning of "use" of a firearm, as provided for in Section 924(d)(1) — a civil forfeiture statute — is totally irrelevant, in that it does not matter by whom the firearm was used before it is forfeited, so long as it was used by someone in violation of the named offenses.

The rule of strict construction was devised for the very purpose of protecting the liberty of individuals in criminal

cases,[14] as contrasted to their interest in things in civil proceedings. It was so designed in order to better preserve the presumption of innocence and the burden of proving criminal charges beyond a reasonable doubt. *See* Harrison v. Vose, 50 U.S. (9 How.) at 378. Under a strict construction regime, "[t]here are **no constructive offenses**; and, before one can be punished, it must be shown that his case is **plainly** within the statute," not just within its policy rationale. *See* Fasulo v. United States, 272 U.S. at 629. Further, only by applying the rule of strict construction would Section 924(c)(1)(A) give "fair warning ... in language that the common world will understand...." McBoyle v. United States, 283 U.S. at 27. Not only is it grammatically incorrect to say that a person has **used** a firearm **during** and relation to a drug trafficking offense when that person had no right of possession, much less any control, of that firearm until **after** the drug transaction was completed, it is to impose meaning obviously contrary to the "common mind."[15]

III. UNLESS 18 U.S.C. SECTION 924(c)(1)(A) IS STRICTLY CONSTRUED, THE DEFENDANT WILL HAVE BEEN CONVICTED OF AND SENTENCED FOR A CRIME NOT DEFINED BY CONGRESS

In ordinary parlance, a person who bargains for a firearm in exchange for drugs would be spoken of as a person who **received** or **accepted** the firearm as a result of the transaction, not as a person who **used** the firearms to receive or acquire them in exchange for the drugs. *See* United States v. Westmoreland, 122 F.3d at 435 ("[Defendant] received the gun.

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[14] *See* Wiltberger, 18 U.S. (5 Wheat.) at 95.

[15] *See* McBoyle, 283 U.S. at 27.

He was paid with the gun. He accepted the gun. But in no sense did he actively 'use' the gun."). *See also* United States v. Stewart, 246 F.3d at 731 ("[W]e cannot see how a defendant 'uses' a gun when he receives it during a drug transaction. The recipient has not employed the gun, availed himself of the gun, or derived any service from the gun by simply trading his drugs for it."). This characterization of the event would hold true whether or not the person who received the guns actively solicited or passively accepted the firearm in exchange for the drugs. *See* United States v. Stewart, 246 F.3d at 732.

Obtaining a firearm by bartering for that firearm with drugs would fit quite comfortably with the common understanding of "receiving" a firearm. *See* Stewart, 246 F.3d at 731-32. Significantly, the Gun Control Act, of which 18 U.S.C. Section 924(c)(1)(A) is a part, contains a number of offenses, the *actus reus* of which is "receive." *See* 18 U.S.C. §§ 922(a)(1)(A) and (B), (3), and (9); 922(g)(1)-(9); 922(h)(1) and (2); 922(j); 922(k); 922(n); 922(p); and 924(b). If it is unnatural or uncommon to construe the word "use" so as to apply Section 924(c)(1)(A) to an act commonly understood as a "receipt" of a firearm, such an application would constitute the very kind of judicial lawmaking that the rule of strict construction was designed to foreclose. *See* United States v. Halseth, 342 U.S. 277, 279-281 (1952) (statute prohibiting mail "concerning any lottery" was construed not to apply to mailing of gambling paraphernalia that may be used to set up a lottery, but only to an already existing lottery).

A careful review of the "receipt" crimes contained in the Gun Control Act reveals that Congress has addressed the issue of the conditions under which a person who receives a firearm ought to be criminalized. Yet, not one of these offenses makes it a crime to "receive" a firearm in exchange for illegal drugs. 18 U.S.C. Section 922(g)(1) does, however, prohibit such

receipt by a person who has in the **past** been convicted of an illegal drug felony offense. 18 U.S.C. Section 924(b) prohibits such receipt by a person who either (a) **intends**, by means of the received firearm, to commit such "an offense punishable by imprisonment for a term exceeding one year" in the **future**, or (b) knows or has reasonable cause to believe that the received firearm is to be so employed in the commission of a **future** offense so punishable. But neither these sections — nor any other section of the Gun Control Act — makes it a crime for a person to "receive" a firearm "during and in relation to [a] drug trafficking crime," *i.e.*, in the **present**. Only if 18 U.S.C. Section 924(c)(1)(A) is subjected to an unnatural and uncommon construction, whereby "use" is stretched to include the "receipt" of a firearm, would a receipt **contemporaneous** with receipt of drugs be made a crime for having "used" the firearm.

To be sure, there may be good reason for receipt of a firearm — whether the firearm is actively solicited or passively accepted — to be made a crime, as the First Circuit concluded in its assessment that "'drugs and guns are a dangerous combination.'" *See* Cotto, 456 F.3d at 29. But, under the rule of strict construction, such an assessment and decision is a legislative choice, not to be short-cut by a judicial fix. *See* Fasulo v. United States, 272 U.S. at 625-26, 628-29 (court rejected government's insistent claim that the phrase "scheme to defraud" should be construed to proscribe any scheme to obtain property by "dishonest means," including threats of murder or bodily harm). As Professor Herbert Packer has pointed out in his classic study of the limits of the criminal sanction:

> If criminal law can be made *a posteriori*, by judges, rather than *a priori*, by legislatures, then the enforcement officials are under strong temptation to

> guess what the judges will do in a particular case. [While] [t]his temptation cannot be eliminated, ... it can be minimized through the habits of thought acquired by enforcement officials who work under the principle of legality. [H. Packer, Limits, at 90.]

As illustrated by this case, the "temptation" for law enforcement officials to overreach in the application of 18 U.S.C. Section 924(c)(1)(A) was especially pronounced. For Mr. Watson's role in a single transaction wherein he exchanged drugs for a firearm, the prosecutor charged him with three felony counts: (1) the sale of a controlled substance, in violation of 21 U.S.C. Section 841(a)(1); (2) use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. Section 924(c)(1)(A); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C Section 922(g)(1). *See* Petition for a Writ of Certiorari of Michael A. Watson, p. 4. As is true of so many drug offenses, this one was initiated by a government informant who, after a discussion with Mr. Watson about the latter's desire to buy a gun and the possible cash price, offered to introduce Mr. Watson to an individual willing to provide Mr. Watson with a firearm in exchange for drugs. A few days later, the informant brought an undercover government agent to provide Mr. Watson with an unloaded pistol in exchange for the drugs, thereby setting Mr. Watson up to be charged with a violation of 18 U.S.C. Section 924(c)(1)(A). *Id.*[16]

By structuring a drugs-for-firearms transaction, rather than a cash-for-firearms transaction, the law enforcement agents

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[16] In like manner, the undercover government agent in United States v. Westmoreland, 122 F.3d at 436, "testified that he purposefully introduced a gun into the [drug] transaction [in that case] for the purpose[] of setting up a conviction on the particular offense defined in section 924(c)(1)."

transformed Mr. Watson's single act from one potential felony charge to three, including the additional charge for violation of 18 U.S.C. Section 924(c)(1)(A) which, upon conviction, required a five-year minimum sentence to be served consecutively to any sentence imposed upon conviction of either of the other two charges. Not surprisingly, the government brought all three possible felony charges.

While the formal charging and sentencing process is a matter of public record, the decisions to structure the sting operation as it was and to charge the three felony counts were made outside "public scrutiny" — "in a setting of secrecy and informality,"[17] and as Professor Packer astutely observed:

> [I]t is here that we can see the real importance of the principle of legality in the criminal law today; for this principle operates primarily to control the discretion of the police and the prosecutors rather than that of judges. [H. Packer, Limits, at 88.]

One of the "devices" traditionally utilized by the courts "to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits is the doctrine requiring strict construction of penal statutes." *Id.* at 93. Had that doctrine been applied to 18 U.S.C. Section 924(c)(1)(A), Mr. Watson would not have been charged under that statute, and therefore would not be facing the lengthy sentence imposed as a result of the statutory minimum and consecutive sentence provisions.

In short, the rule of strict construction is designed to limit the kinds of discretionary decisions made by law enforcement

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[17] *See* H. Packer, Limits at 89.

officers in a case such as this. As such, it both preserves the principle of separation of powers and, more importantly, protects individual liberty,[18] "accommodat[ing] [the] competing demands of order and freedom" by serving "the single, important function of confining the criminal law to [past] conduct."[19] Without the rule of strict construction, and other similar safeguards — such as the void for vagueness doctrine — the door would be wide open for executive officials to impose a criminal sanction, not on the basis of clearly-defined past conduct, but on the basis of a generalized policy to prevent "the very dangers and risks" of "violence and death" that guns in combination with drugs create.[20]

IV. IF 18 U.S.C. SECTION 924(c) IS NOT STRICTLY CONSTRUED, IT WILL ACCELERATE THE EROSION OF STATE CRIMINAL LAW IN VIOLATION OF THE CONSTITUTIONAL PRINCIPLE OF FEDERALISM.

At first blush, the precise legal issue presented in this case — whether the unlawful sale of a controlled substance in exchange for a firearm violates 18 U.S.C. Section 924(c)(1)(A) — may seem narrow, technical and likely to affect only a few persons, most of whom are already engaged in unlawful conduct. However, this case presents this Court with

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[18] *See* Wiltberger, 18 U.S. (5 Wheat.) at 95-96, and Harrison, 50 U.S. (9 How.) at 378.

[19] H. Packer, Limits at 96. *See also* Romans 13:3-4 ("For rulers are not a terror to good **works**, but to the evil.... For he is the minister of God to thee for good. But if thou **do** that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that **doeth** evil.") (emphasis added).

[20] *See* Smith, 508 U.S. at 240.

the opportunity to return to the doctrine of the strict construction of penal statutes, which, in turn, would defend the constitutional principle of federalism, protecting the central role of states and localities in criminal law enforcement.

The U.S. Constitution hardly provides unquestioned support for the type of robust federal criminal code that has developed in recent years. Indeed, the Constitution expressly authorizes Congress to create only a handful of federal criminal offenses, such as counterfeiting (U.S. Const., Art. I, Sec. 8, cl. 5), piracy (*Id.*, Art. I, Sec. 8, cl. 9), and treason (*Id.*, Art. II, Sec. 4; Art. III, Sec. 4). A few additional categories of federal crimes can be implied from other powers, such as tax fraud (*Id.*, Art. I, Sec. 8, cl.1) and immigration fraud (*Id.*, Art. I, Sect. 8, cl. 4). Only the promiscuous use of the Commerce Clause combined with the neglect of the Tenth Amendment has enabled the federal government to occupy the field of criminal law reserved to the states.[21]

Just a dozen years ago, after decades of proliferation of federal crimes, the Supreme Court reviewed the possible constitutional bases for criminal law in Art. I, Sec. 8 and reaffirmed that the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation. See Art. I, Sec. 8." United States v. Lopez, 514 U.S. 549, 566 (1995). Indeed, "[f]or much of our national history, the deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited — was recognized in practice as well as principle." ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law, p. 17

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[21] "Virtually all of the federal criminal legislation of the twentieth century has been based on the Commerce Clause." G. Ashdown, "Federalism and the Criminal Justice System," 98 W.Va.L.Rev. 789, 807 (Spring 1996).

(1998).

The instant case illustrates the degree to which federal criminal law has come to overlap, not supplement, state criminal law. Watson was charged with three discrete federal felonies:

- "**distribution of a Schedule II controlled substance**, in violation of 21 U.S.C. § 841(a)(1)" with a maximum penalty generally of 10 years to life imprisonment.

- "**possession of firearms by a convicted felon**, in violation of 18 U.S.C. § 922(g)(1)"[22] with a maximum penalty of five years.

- "**use of a firearm during and in relation to a drug trafficking offense**, in violation of 18 U.S.C. § 924(c)(1)(A)" with a consecutive penalty of not less than five years.

Watson's offenses easily could have been dealt with under

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[22] In 2000, the Supreme Court established that 18 U.S.C. Section 924(c)(1)(A) ("uses or carries ... during and in relation to or who in furtherance of any such crime possesses" with a penalty of "not less than 5 years"), as well as Section 924(c)(1)(B) ("short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon" with a penalty of "not less than 10 years"), established a separate substantive crime, discrete from the underlying "drug trafficking offense" or "crime of violence," and therefore must be alleged in the indictment and proved to a jury beyond a reasonable doubt. Castillo v. United States, 530 U.S. 120, 122 (2000).

Accordingly, 18 U.S.C. Section 924(c)(1) is fundamentally different than 18 U.S.C. Sections 924(c)(1)(A)(ii) ("brandishing," with a penalty of not less than 7 years) and 924(c)(1)(A)(iii) ("discharge" with a penalty of "not less than 10 years), which are sentencing factors that need not be raised until the sentencing phase. *See* Harris v. United States, 536 U.S. 545, 556 (2002).

Louisiana state law in Louisiana state courts. As to the controlled substance charge, he could have been charged with a violation of La. Rev. Stat. Section 40:967(B)(4)(b), with a penalty of being imprisoned "at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension...." As to the felon in possession charge, Watson could have been charged with a violation of La. Rev. Stat. Section 14:95.1(A-B), with a penalty of being imprisoned "at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence...." But third, the firearms "use" charge brought in the federal system would probably never have been brought, as Louisiana state law clearly requires that the offender "actually possessed" or "actually used" a firearm. La. C.Cr.P. Art. 893.3.

Of course, this examination of state law does not assist the court in interpreting the text of a federal law using different words, but it does illustrate that the people of Louisiana, acting through their elected officials, have criminalized most of the behavior that Watson engaged in, and, as a matter of routine, could have handled this prosecution.[23]

Strictly construing this and all other federal criminal statutes would remove at least a measure of the temptation for law enforcement officials to bring what are essentially state criminal charges into the federal system. Such a choice between federal and state systems is not a matter of little or no

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[23] Indeed, domestic drug trafficking is the most frequently prosecuted federal offense (over 28 percent of all federal criminal filings in FY 1997), whereas federal prosecutions for domestic drug trafficking account for less than an estimated 2 percent of all prosecutions (federal and state) in the nation. ABA Task Force on Federalization of Criminal Law, The Federalization of Criminal Law (ABA) (1998), p. 20.

import. In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law published an extensive study of The Federalization of Criminal Law.[24] Of particular relevance to the erosion of state police power, the task force found:

> In the absence of a distinct federal interest, the decision to prosecute can lack a guiding federal principle. A federal prosecutor is under no legal requirement to state why any particular defendant has been selected to be prosecuted in the federal system and receive a significant federal sentence, and why the many other similar defendants are left to state prosecution. Restraint is essentially left to self-imposed prosecutorial discretion. [*Id.*, p. 33.]

Additionally, strictly construing federal statutes can lessen the temptation at the state level to "use possible federal prosecution, with its likely harsher punishments, as a threat." *Id.*, p. 34. To illustrate this threat, the ABA Task Force observed:

> A **state** drug defendant was offered a guilty plea which would have led to a 4-8 year sentence. When the defendant declined and wanted a trial, a **federal** drug prosecution was brought, leading to a mandatory life

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[24] Members of the task force represented a wide variety of views, from former Congressman and Chairman of a House Judiciary Subcommittee on the Courts, Intellectual Property, and the Administration of Justice Robert W. Kastenmeier (D-IL), to former Chief Justice of Alabama and former United States Senator and Howell Heflin (D-AL), and to former United States Attorney General Edwin Meese III (the Task Force's Chair), and Professor John S. Baker, Jr., the Dale E. Bennett Professor of Law at Louisiana State University.

sentence. [*Id.*, p. 34 (emphasis added).][25]

Writing about the abuses that can flow from an Independent Counsel, Seventh Circuit Judge Richard A. Posner makes similar important comments on the current state of the federal criminal justice system.

> The machinery of federal criminal investigation and prosecution, with its grand juries, wiretaps, DNA tests, bulldog prosecutors, pretrial detention, broad definition of conspiracy, heavy sentences (the threat of which can be and is used to turn criminals into informants against their accomplices), and army of FBI agents, is very powerful; there is a fear that fed enough time and money, **it can nail anybody**. There is some truth to this, since there are **literally thousands of federal criminal laws**, many of them **at once broad, vague, obscure**, and underenforced.... [R. Posner, An Affair of State, Harvard University Press, p. 87 (1999) (emphasis added).]

Many federal criminal laws remain "broad, vague, [and] obscure," because of the absence of a judicially-announced protective rule of strict construction assuring clarity in the criminal law.[26]

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[25] Citing Jim Smith, Petty Pusher Goes Out Big Time, *Philadelphia Daily News*, July 17, 1992, and Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 Annals Am. Acad. Pol. & Soc. Scl. 85 (1996).

[26] Even God did not judge before the law had been clearly declared; neither should the state. "For until the law sin was in the world: but sin is not imputed when there is no law." Romans 5:13.

CONCLUSION

The instant case — that may seem narrow, technical and likely to affect only a few persons — provides this Court with a vehicle to re-establish a first-order rule of construction to protect the legitimacy of our federal criminal justice system. For this reason and for the others stated herein, petitioner's conviction of and sentence for violation of 18 U.S.C. Section 924(c)(1)(A) should be overturned.

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